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91-1079

No. _____

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In The

Supreme Court of the United States

October Term, 1991

STEPHEN R. SELINGER,

Petitioner,

v.

CITY OF REDLANDS,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal, Fourth District, Division Two, State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a *partial taking* of a well defined property right a violation of the United States Constitution – even if all rights associated with the property are not taken, and all value of the property is not destroyed?

2. Do due process prohibitions against vague economic ordinances prevent a municipality from disapproving a project on the basis of unfocused (general plan) policy statements, especially when the municipality has previously determined that the project is consistent with all of the *more specific* city ordinances and the general plan itself (and then arbitrarily reversed itself?)

PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Fourth Appellate Court, Division Two, of the State of California.

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Stephen Selinger seeks review of a decision of the Fourth Appellate District, Division Two upholding denial of his subdivision application.

OPINION BELOW

The unpublished opinion of the Fourth Appellate District is reproduced as Appendix A. The unpublished statement of decision of the trial court is reproduced as Appendix B.

JURISDICTION

The Californial Supreme Court Denied review of this case on October 2, 1991. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "[N]or shall any private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

California Government Code Section 65589.5(j) provides:

> 655895.5(j). When a proposed housing development project complies with the applicable general plan, zoning, and development policies in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exist:
>
> (1) The housing project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density.
>
> (2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

California Government Code Section 66474.2 provides:

> In determining whether to approve or disapprove an application for a tentative map, the local agency shall apply only those ordinances, policies, and standards in effect at the date the local agency has determined that the application is complete pursuant to Section 65943 of the Government Code. However, if the local agency

> has formally initiated proceedings by way of ordinance of resolution and published notice of such ordinance or resolution, in accord with the procedures used by the local agency for publication of ordinances, to amend applicable general or specific plans, or zoning or subdivision ordinances before it has received the complete application, the local agency may apply any ordinances, policies, or standards enacted or instituted as a result of those proceedings which are in effect on the date the local agency approves or disapproves the tentative map. If the subdivision applicant requests changes in applicable ordinances, policies of standards in connection with the same development project, any ordinances, policies or standards adopted pursuant to the applicant's request shall apply.

California Civil Code Section 3534 provides:

> Particular expressions qualify those which are general.

California Government Code Section 65300.5 provides:

> A general plan must be construed as an integrated, internally consistent and compatible statement.

The relevant section of the City's general plan and zoning ordinances that are applicable to the subject project are reproduced as appendices C and D; appendix D contains the slope density standard of the applicable zoning ordinance with which the project conformed. A new zoning and grading ordinance (not applicable to this project) is reproduced as Exhibit E.

STATEMENT OF THE CASE

This case starts out like a typical California land use "horror" story – and then gets worse. The City of Redlands annexed Mr. Selinger's property into the City with a zoning of 1/2 acre minimum lot size. It proceeded to radically downzone the property to mostly 5 to 10 acre zoning – allowing only 10 to 20 percent of the density initially allowed on most of the property. However, when the City realized that a state (grandfather) law stood in the way of applying the new zoning to this site, it went beyond the typical California horror story by inventing a perverted interpretation of its old ordinances (based upon vague, unfocused policy statements) so that it could circumvent the state law and deny Mr. Selinger's property right to project approval. It did this despite having just found the project consistent with the zoning, general plan, and all other relevant ordinances.

Mr. Selinger optioned approximately 260 acres of land in San Bernadino County in 1985 (and eventually purchased the land). The land was then in the unincorporated County of San Bernadino. The City of Redlands proceeded to annex this land. It was annexed into the City in December 1985, with a zoning and general plan designation with a minimum lot size of 20,000 square feet (1/2 acre).

Mr. Selinger proceeded to file a tentative map application to subdivide the land in conformity with the attached zoning and general plan in April 1986. On May 12, 1986, The City of Redlands informed Mr. Selinger that the application was complete and shortly thereafter told him that an environmental impact report (EIR) would be

required. Under California law, the local ordinances in effect at the time of a completed tentative map application are the ones that shall be applied to it. (Government Code Section 67474.2) Mr. Selinger paid $9,840.00 for his map application, $17,100.00 for the E.I.R., and additional amounts for civil engineers, soil engineers, traffic engineers and biologists.

The City was under pressure from neighbors who lived in the developed areas adjacent to this land to radically downzone the land and keep it essentially undeveloped. The adjacent parts of the City had developed according to approximately the density that Mr. Selinger's tract proposed – about 1.1 units per acre. (The area development map in Appendix F shows the 1.1 units per acre of this project consistent with the densities of the adjacent previously developed areas (except those that were recently annexed and still undeveloped.) The neighbors succeeded in pressuring the city to ultimately downzone the area so that the majority of Mr. Selinger's property would have minimum lot sizes of between 5 and 10 acres; ordinance 2030 (Appendix E) has minimum lot sizes of between 5 and 10 acres (for slopes over 30% with Saugus soils) and over 50% of Mr. Selinger's property fits in this category.

There was only one problem with this scheme to downzone – a state law (Government Code Section 66474.2) stood in the way of applying the new downzoning to Mr. Selinger's application; this law *vests* Selinger's application under the old zoning. Nevertheless, on February 9, 1988, the City Council certified an environmental impact report stating that the project was consistent with the former (and applicable) zoning and general plan but

should be revised to comply with the new general plan (Appendix G).

The environmental impact report stated, in the relevant sections, that any traffic problems could be mitigated by the developer building a new road and directing all traffic to the south. (Appendix H) The report also listed the use of sewers as a mitigation measure to any problems of wastewater disposal (Appendix H). The City's Utility Department Director stated this was feasible at the public hearing and Selinger stated that he was willing to use sewers at the public hearing. (In the adoption of the new down zoning, the City also adopted a *new* policy of not allowing sewers in this area which they illegitimately applied to this project.)

Government Code Section 65589.5(j) states that a residential subdivision which complies with the zoning, general plan, and development policies in effect at the time of its completed application can only be denied if there are safety or health problems which cannot be mitigated or avoided. The City here certified an Environmental Impact Report which stated that the project was consistent with the zoning and general plan; it also listed specific mitigation measures of building a new road and sewering which would avoid any alleged safety or health impacts. In a civil context, this would basically be a summary judgment case where the City had admitted all of the facts necessary to force them to approve the subdivision.

To be sure, in their zeal to deny the project, the City included some conclusory remarks in the conclusion of the Report that the project produced unavoidable adverse environmental impacts in the areas of traffic, wastewater, and cumulative impacts (in the areas of traffic and wastewater). The specific sections of the Report mentioned

above, however, totally contradict these conclusory remarks, for there, the specific mitigation measures are listed which avoid all traffic and wastewater impacts (and there were no alleged cumulative impacts other than those areas).[1] Indeed, the very next sentence after the City's statement of "unavoidable" impacts contains the mitigation measures of directing the traffic to Live Oak Canyon Road, and sewering, which *avoid* these impacts. (See Appendix H).

In May 1988, after just certifying an environmental impact report stating that the project was consistent with the zoning and general plan, and after having studied the project for 20 months, the City Council asserted for the first time that the project was inconsistent with the general plan. The Council maintained that the project was inconsistent because it did not comply with two vague, unfocused policy statements in the general plan.

The first policy establishes as a "principle for development of hillsides" to encourage the retention of natural hillside areas and "minimize the quantity of earth moving as must as possible." This by itself is little more than a general expression of the City's desire that grading

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[1] At the Appeal Court, the City argued for the first time that these conclusory remarks regarding unmitigable impacts prevent a Court from approving the project. However, since the EIR's specific sections, closing statement, and public hearing testimony of the City Utility Director totally contradict these conclusory remarks, a Court can unquestionably order the City to make the correct findings. Moreover, since Government Code Section 65589.5 was enacted well after the California Environmental Quality Act, any conflict should be resolved in favor of the most recently enacted statute.

should not be performed for its own sake, yet the City denied the project on this basis. If this vague statement is a valid basis for denial, no local government is ever constrained at all. The City maintained this despite a certified (City Approved) EIR which stated "the grading is necessary to locate roads and building pads in a logical distribution, consistent with City standards and not posing a threat to life and property." The grading was designed to comply with the more specific City grading ordinances, and these ordinances are required to be consistent with and implement the general plan policies. (See *Friends Of "B" Street v. City of Hayward*, 106 Cal. App. 3d 988 (1980).

The City's "evidence" for its stance consisted of a comparison of the number of cubic yards this Project proposed to grade versus the number of yards three other projects proposed. Given the varying topographies of the different sites, and the different densities proposed, such evidence is irrelevant to whether this tract proposed more grading than was necessary. What would have been evidence, and was not possible to produce, was evidence that this hill or that hill on the site was being graded and didn't have to be. Indeed, the City's application for the tentative map does not even require the number of cubic yards proposed to be graded; it was merely listed as a preliminary informational "guesstimate" on the map by Mr. Selinger's engineer. Given that the application does not even require information on cubic yards moved, this cannot possibly be used as a basis for denial.

The City similarly misapplied vague policy statements as to traffic. Here, it took general statements encouraging the free flow of traffic ("provide adequate

streets and vehicular circulation to serve the area") and used them to deny the project while ignoring the more specific expressions of City policies in the General Plan and relevant ordinances. The circulation map in the General Plan outlining the City's plan for the area specifically contemplates an access road through the Project, intersecting Sunset Drive, an established street. (Appendix I shows the same road on the City general plan map as on the project circulation map; Appendix I also shows the feasibility of avoiding all alleged traffic impacts by directing traffic south to Live Oak Canyon Road.) Yet the City cited traffic on Sunset Drive as a general plan reason for denying the project. Given that the General Plan must be internally consistent (California Government Code Section 65300.5) and that it specifically contemplates the Project and its feeding of traffic onto Sunset Drive, the Project as contemplated by the General Plan does not violate the more general expression of policy.

Selinger brought suit that the City had no legitimate grounds upon which to deny his application. The trial court ruled that there were unavoidable traffic impacts on Sunset Drive and simply ignored the uncontroverted evidence regarding the mitigation measure of building a road for southerly access and avoiding Sunset Drive completely. The Appellate Court ruled that a comparison of how many cubic yards of dirt the other tracts moved was sufficient evidence to conclude that his Project was proposing too much grading and inconsistent with the general plan. It did not address the argument that such non-site specific evidence is irrelevant to whether *this* site is grading more than necessary, that the proposed grading complied with the specific grading ordinances, or the EIR's

statement that the proposed grading was necessary for the use and drainage of the site (and that the project was consistent with the general plan).

The constitutional issues regarding the violation of Selinger's vested property rights, and that reliance on general policy statements to deny these rights leads to countenancing arbitrary behavior, were raised at the Appellate Court; the Appellate Court's opinion mentioned this vested property rights issue. App. 4. The same issue, viz., that Mr. Selinger had a right to project approval because there was no basis for the City's decision, was raised at the trial court level. The Court of Appeal denied the request of both parties that the opinion be published.

REASONS FOR GRANTING THE WRIT

A. Conflicting Opinions Of The Supreme Court Regarding Partial Takings Should Be Resolved; The Rule Of *Webb's* And The Rehnquist-Stevens *Penn Central* Dissent Is Correct.

The Supreme Court has sometimes held that a taking of a property right, well defined under state law, is a compensable taking – even if other rights associated with the property are not taken (and all of the value of the property is not taken). On other occasions, the Court has held that virtually all use of the property must be taken for there to be a compensable taking.

These different positions should be resolved and the facts of this case present a dramatic posing of the question. It is clear that California law gives a property owner applying for a residential subdivision the right to be governed by the laws in effect at the time of his completed application, and to be granted approval if he complies with the zoning (and general plan) and there are no unmitigable safety or health problems. The Redlands City Council admitted that Mr. Selinger's project satisfied all of these conditions for approval and then arbitrarily reversed itself. Was there a taking then, of Mr. Selinger's right to subdivide his property, and is this a violation of the Fifth and Fourteenth Amendments to the United States Constitution – even if the taking did not result in the complete devaluation of Mr. Selinger's property?

The Supreme Court has held that "property rights are not created by the Constitution; rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1983). In the same case, the Court also held that intangible property rights created by state law, such as the right to protect trade secrets, are entitled to the protection of the takings clause.

Applying these principles to a Florida case, the Supreme Court found a violation of the Fifth and Fourteenth Amendments when a partial taking occurred that violated a property right defined under Florida state law. *Webb's Fabulous Pharmacies, v. Arthur H. Beckwith, Jr., Clerk of the Circuit Court*, 449 U.S. 155 (1980). Florida law provided for a separate fee to cover any costs in an interpleader action. The usual rule is that any interest accrued

to the principal belongs to the party that ultimately prevails in the interpleader. Florida's taking of this interest, when any costs that the state might incur in the interpleader were already covered by statute, was held to be a violation of the Fifth and Fourteenth Amendments.

Note that the Court held that there was a violation of the Fifth and Fourteenth Amendments even though there was only a partial taking. There is no question that the Florida's action did not take all (or substantially all) of the property in question; they only took the interest and none of the principal deposited. Yet the Court held that this partial taking was an unconstitutional partial taking.

In the subject case, Mr. Selinger clearly had a property right, defined and created by the State of California, to subdivide his property; see "Vesting Tentative Maps", Robert Merritt, *Real Property Law* Reporter, November, 1985, for the policy reasons behind the decision of the California Legislature to create this right. Equally clearly, Mr. Selinger met the requirements of zoning and general plan consistency, and no unmitigable safety or health problems, and was thus entitled to project approval. His denial of this property right should be recognized as a partial, but compensable, taking.

This Court has recently accepted review of a case where the question of whether the wrongful denial of a *construction permit*, which had been approved and then arbitrarily denied, is a violation of substantive due process (*PFZ Development v. Rodriquez*, (Current Docket 91-122)). It would be useful for the Court to address whether the wrongful denial of a *subdivision permit* is a

violation of the takings clause of the United States Constitution (and/or a violation of substantive due process). In the subject case, as in *Rodriquez*, the City initially admitted all of the conditions necessary to force it to approve the permit, and then arbitrarily reversed itself.

The Court has yet to explicitly recognize that the intangible property rights of *real* property, created by state law, are entitled to constitutional protection and that their violation is a taking. Such rights include the right to subdivide one's property for a residential development, as guaranteed by California law.

The wrongful denial by local government, of such a state defined property right, is a taking. If the applicant meets all of the conditions the state of California requires for the subdivision permit, and local government then refuses the permit, the applicant's property right has been taken. The situation is analogous to a contract; the developer met his part of the bargain and it is a violation of his property rights if the city does not meet its.

The position taken in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 108 (1978) basically upholds partial takings as constitutional and conflicts with the rule of *Webb's*. The City denied the owners of the New York City structure the right to build on the airspace above their property pursuant to a goal of landmark preservation. The Court held that so long as the use of the existing structure wasn't taken, the City could prohibit the owners from using that portion of their property consisting of airspace. They basically held that as long as there wasn't a total taking of the building and airspace, there was not a constitutional violation.

The subject case is on all fours with *Penn Central*. *Penn Central* met all local ordinances, and had the right to build in the airspace under New York law until new city landmark preservation ordinances were instituted. Selinger similarly met all local ordinances, and had the right to build his subdivision under California law, until the new City hillside preservation ordinances were instituted.[2]

The only difference between *Penn Central* and this case is that the officials in *Penn Central* honestly and straightforwardly admitted that they were denying the permit because of new preservation ordinances. In the subject case, the City first admitted that the project was consistent with the zoning and general plan (and that there were no unmitigable safety or health problems) but stated the project should be denied due to the new hillside preservation ordinances. It then arbitrarily reversed itself and pretended to deny the project on the basis of the old zoning. The arbitrary and capricious reversal, in the absence of changed circumstances, is beyond the scope of the City's legitimate police powers and is invalid for that reason as well. (*Arnel Development Co. v. City of Costa Mesa*, 126 Cal. App. 3d 337 (1981).

Penn Central's countenancing of partial takings conflicts with the rule of *Webb's*. It leads to the position that as long as some "reasonable return" is allowed on an investment, there is not a taking – even if clearly defined property rights are violated.

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[2] This case is similar to *Penn Central* in that a physical taking took place as well in each instance; *Penn Central's* ability to occupy its airspace was taken and Selinger's ability to build on his ridgelines was taken.

The permission for local government to not have to compensate for partial takings leads to the inchoate abyss into which takings analysis has fallen – and of which Chief Justice Rehnquist's *Penn Central* dissent (p. 149) (joined by Justice Stevens) clearly warned:

> Difficult conceptual and legal problems are posed by a rule that taking only occurs where the property owner is denied all reasonable return on his property. Not only must the Court define "reasonable return" for a variety of types of property (farmlands, residential properties, commercial and industrial areas), but the Court must define the particular property unit that should be examined. For example, in this case, if appellees are viewed as having restricted Penn Central's use of its "air rights", all return has been denied. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 C. Ct. 158, 67 L.Ed. 322 (1922). The Court does little to resolve these questions in its opinion. Thus, at one point, the Court implies that the question is whether the restrictions have an "unduly harsh impact upon the owner's use of the property," ante, at 127; at another point, the question is phrased as whether Penn Central can obtain "a reasonable return" on its investment, ante, at 136; and, at yet another point, the question becomes whether the landmark is "economically viable," ante, at 138 n. 36.

Against the vagaries of *Penn Central's* rule of "unduly harsh impacts", "reasonable returns", and "economic viability", the rule of *Webb's* (and the dissent in *Penn Central*) stands out like a beacon of clarity, viz., if government violates a well defined property right, there is a

taking – even if all other rights associated with the property are not violated, and even if all use of the property is not destroyed. The Fifth Amendment allows no less.

A clear statement of the takings rule implicit in *Webb's* is sorely needed to remedy the situation which the dissent in *Penn Central* clearly saw coming. As University of Chicago Law Professor Richard Epstein stated regarding *Webb's*:

> Note the implicit assumptions of the case. The takings clause applies to partial takings; that simple declaration does not avail against the clause. The state fees cover only its costs and do not reach the benefits that interpleader gives the private parties. In principle, all these arguments could apply to every other form of government regulation, from control over public waters to zoning regulations . . . But the Court's mode of argument suppresses logical deductions from general premises, so *Webb's Fabulous Pharmacies* governs a tiny corner of the law instead of outlining major constitutional structures." *Takings*, p. 12.

This case gives the Court the opportunity to outline the major constitutional structures behind *Webb's* partial takings analysis, expose the logical fallacies in *Penn Central*, and clear up takings analysis in the process.

B. Takings Cases Should Be Examined More Carefully When There Is No Implicit In-Kind Compensation, And Appeal To The Political Process Is Not Tenable.

Granted that Mr. Selinger's state defined property right to build a residential housing project was taken. The Constitution, however, requires "just compensation" if takings occur and hence we must inquire if implicit compensation resulted from similar restrictions imposed on others.

Implicit in-kind compensation, for what would otherwise be an unjustified taking, has been a traditional justification of otherwise indefensible governmental actions. Justice Holmes stated that governmental action may be sustained when it works to the "average reciprocity of advantage" of all interested parties. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The dissent in Penn Central also cites this principle and case.

California Courts as well have commented on the contractual nature of a legitimate zoning scheme. Each party forgoes some right to use its land in assurance that the neighboring land will be similarly restricted; the rationale is that mutual restrictions will enhance all parties. *Togana Assn. For A Scenic Community v. County of Los Angeles*, 11 C.3d 506 (1974).

In the present case, however, we have existing residents on the north side of the Sunset Drive Ridge who live on property zoned minimum ½ acre lot size. To encourage Mr. Selinger to annex his property (on the south side of the Sunset Drive Ridge) from the County up to the City, the subject property was initially zoned the

same 1/2 acre lot minimum designation. Then when he attempted to develop it according to that designation, the City proceeded to illegitimately deny his project and to radically downzone his property to mostly 5 to 10 acre minimum lot sizes (an increase in the minimum lot size of 10 to 20 times what it had been). Takings of property should be examined more closely when the justification of implicit in-kind compensation is just not tenable – as in this case. What we have is a rather stark example of existing residents imposing radically different rules on adjacent landowners.

Since these landowners are vastly outnumbered by existing residents, who would prefer to keep the land undeveloped as open space, appeal to the local political process is just not a tenable way to remedy the situation. Such a situation is very appropriate for judicial review and protection of property rights of the minority landowners.

C. Ordinances Of Local Government Must Be Interpreted In A Non-Arbitrary Manner, And Not As A Pretext For Other Motives, In Order To Pass Constitutional Muster.

The City at first admitted in a certified EIR, after studying the project for more than twenty months, that the Project was consistent with the zoning and general plan for the site. Less than two months after this, with no changes at all in the project, the City arbitrarily reversed itself and said the project was inconsistent with the general plan for not complying with vague policy statements regarding traffic and grading. Unless local governments

are to live in an *Alice In Wonderland* fairy tale world where whatever they say is necessarily true, this arbitrary reversal, and reliance on vague policy statements to support it, should not be tolerated.

The Court has discussed three important values that vague laws offend; two of these will be discussed here. *Grayned v. City of Rockford*, 408 U.S. 104 (1971) states:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws also may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

How would an individual of ordinary intelligence know if he is proposing a plan that is prohibited by the laws? How would an individual ascertain if he is in compliance with the City grading policy, as well as the policy allowing up to 2 units per acre? An individual would naturally look to the *more specific* ordinances which implement such policy – in this case the grading and zoning ordinances. Mr. Selinger's project was in compliance with both of these more specific ordinances (as the Appellate Court opinion admitted, App. 4, 17); accordingly, he should be deemed to be in compliance with the general policy.

The actions of Redlands, and their ratification by the Appeal Court, amount to turning the legal maxim that "particular expressions qualify those which are general"

on its head. California Civil Code Section 3534. When these expressions are of the high level of generality as "minimize grading as much as possible," the potential for unconstitutional vagueness problems is obvious – particularly when the more specific implementing ordinances are ignored when it suits the City's purposes.[3]

Moreover, in addition to being in compliance with the more specific implementing ordinances, the City produced no evidence the project did not comply with the general policies. The City produced no evidence that grading was being proposed which was more than that needed to develop the site. Its reference to the amount of dirt moved in other sites – with different terrain and density proposed – is not evidence that the amount of proposed dirt moving on this site was more than necessary. Citing *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) another California Court stated that such non-site specific evidence is not substantial evidence, and not sufficiently linked to conditions of the subject site, to

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[3] The appeal court (App. 16) indefensibly mentions the City's flexible density standard in support of its opinion; this varying density standard is supposed to reflect the varying topography in the hillside residential district. However, the project was designed to conform with this slope-density standard, and did indeed conform with it. The City admitted, and the Court's opinion recognized (App. 4), the project's compliance with the R-A zoning ordinance, of which the slope-density requirements is a major part. (See section 14.20 of the R-A zoning ordinance.) Contrast the concrete specificity of the R-A zoning ordinance (with which the City and the Court admitted the project complied) with the vague generalities of the policy statements of the general plan (with which the City and Court held the project to be inconsistent).

justify restrictions on the use of the site. *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260 (1991).

The City's appeal to these general policy statements was simply a pretext for its real motive of trying to radically downzone the subject property by applying the new general plan to the property. When it realized it couldn't do this, it used these vague statements as the pretext to deny the project.

Such broad, unfocused policy statements are common throughout California planning documents, and indeed throughout the United States. This is because laws governing land use policy are not self-executing. As Richard Epstein observed:

> The risks of intrigue becomes [sic] clearer if we recall that most systems of land use control are not normally self-executing. Instead, they set out in very general terms the desired ends – preservation of aesthetic qualities, prevention of urban sprawl, maintenance of individual neighborhoods, or whatever.[4] Thereafter, the operation of the system depends upon discrete applications, usually culminating in decisions by a local planning board, often in response to some highly particularized request of local groups. An enormous slippage thus occurs between the articulation of a general principle and its concrete application. *Takings*, Pg. 264.

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[4] See, e.g., Cal. [Gov't.] Code § 65302(a) (West 1983).

Given the widespread occurrence of these (non self-executing) general policy statements, a statement from the

Court is needed that they must be applied in a principled way, and with reference to the *more specific implementing* ordinances, if they are to avoid being unconstitutionally vague.

The manufacturing of a pretextual reason to deny property rights is something that continually occurs – despite this Court's instructions to local government in the past. In *Nollan*, for example, the pretextual reason for a lateral (seaside) easement across a property was that visual access would be blocked by the building of a house. The Court observed that this lateral easement along the beach could not remotely provide visual access from the street to the property. Similarly, in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, (1984) the Court rejected the City's pretextual reasons against housing for the retarded as resting "on an irrational prejudice against the mentally retarded."

Redlands' manufactured, pretextual reasons for denying the project are just as transparent as the above cases. Its actions are even more odious because of its sudden and arbitrary reversal, having just found the project consistent with the general plan in the EIR. This kind of arbitrary behavior is precisely what the prohibitions against vague laws are intended to eliminate.

The other important value that vague laws offend is a prohibition against arbitrary and discriminatory enforcement. The public record shows Mr. Selinger asked the City Planning Staff to name one previous example where a project had ever been denied for violation of this vague grading policy. The staff was unable to name even one as this was indeed the first time the "policy" had ever been

stated as a reason to deny a project (in the 16 years that the general plan had been in effect). This is a clear example of the arbitrary and discriminatory enforcement problems to which vague laws lead.

The Court has said that municipal ordinances regarding economic regulation are subject to a less strict vagueness standard than ordinances relating to protected first amendment rights, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1981). This does not mean, however, that there should be *no* review of a city's attempt to misapply vague policy statements regarding economic regulation. This case provides a useful example to make that point.[4]

D. Taking's Analysis Would Be Strengthened By The Court's Consideration Of A Large Scale Project Where All Use Of The Land Is Not Taken, And There Are No Safety Or Health Considerations.

Local government has been very careful in following the ruling that it can regulate property as long as it does not take away all value, and allows a reasonable rate of return. Seldom will you see a property zoned as outright open space as that would constitute an obvious taking. Rather the strategy is to zone the property at such a low density that development is effectively precluded, or if it

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[4] While a certain amount of vagueness may be unavoidable in regulations governing matters of aesthetics, the present case does not concern such aesthetic matters and the City was quite able to fashion more specific, objective standards. Once having fashioned such specific standards, they are precluded from relying upon vague generalities to deny a project.

does take place, the density is so low that the land remains essentially open space. Cases where *all* use of the land is taken, such as *First English Evangelical,* 482 U.S. 304, (1986) or the recently accepted *Lucas v. South Carolina Coastal Council,* (Current Docket) are relatively rare in that those cases involved actions which totally denied all use of the land. While important, analysis of cases such as these has limited impact because most local governments avoid totally destroying the value of the property for fear of a takings claim. These cases are also of limited impact because many of the actions of local government are not related to safety or health considerations, as were involved in both of these cases. Few would dispute that drastic government action is justified where there are legitimate safety or health considerations but so many governmental regulations and actions do not concern these matters. The feasible mitigation measures of extending sewer lines, and building a new road, show that there are clearly no legitimate safety or health issues in this case, despite any pretextual reasons proffered by the City.

Unfortunately, the actions of local government are more frequency motivated by pressure from the NIMBY (Not In My Back Yard) syndrome, rather than legitimate safety or health issues. People that already own their own houses are anxious to shut the door on others behind them. In the subject case, we have the unequitable situation of individuals on the developed north side of the Sunset Drive Ridge, living on ½ acre lots, trying to zone the adjacent, undeveloped land at mostly 5 and 10 acre

lots. This is a clear case of those who are already in trying to pull up the gates behind them.[5]

The Legislature of California was quite mindful of the deleterious effects of the NIMBY syndrome. In the findings sections of Government Code Section 65589.5, the Legislature found that California has the most expensive housing in the nation and that this lack of affordable housing threatens the economic, environmental, and social quality of life in California. To this end, the Legislature enacted laws to circumvent the tendency of local government to cave in to the NIMBY syndrome.

The Legislature has required both that each local government: (1) shall incorporate in its general plan sufficient housing to accommodate its share of the regional housing need and (2) shall not deny a residential housing subdivision *application* in conformity with the general plan and zoning unless there are unmitigable safety or health problems.

Prior to these legislative changes, there was no vested right in California to one's zoning; no rights vested until building permits were issued.[6] In stating that a completed *application* for a residential subdivision had the right to be governed by the zoning and general plan in effect at the time of the completed application, the Legislature was recognizing the importance of promoting housing in the face of the NIMBY syndrome. One way to

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[5] See the Kemp Commission Report *Not In My Back Yard*, Chapters 1 and 2.

[6] See *Real Property Law Reporter*, Vol. VIII, No. 8, November 1985, pp. 165-171, California Continuing Education Of The Bar.

do this was to recognize that building permits played a relatively trivial role in the current entitlement process – as compared with annexations, general plan amendments, zone changes, and environmental impact reports. In this regard, as previously related, Mr. Selinger had to expend considerable sums of money.

In attempting to promote housing, the Legislature expanded the previous dimensions of vested property rights, and created the intangible property right to be governed by the zoning rules in effect at the time of one's completed application.[7] If an applicant for a residential subdivision satisfies the conditions of zoning and general plan consistency, and no unmitigable safety or health problems, local government is obligated to approve the subdivision. Recognition of this intangible property right[8] would reinvigorate takings analysis, as few cases involve the total destruction of a person's property, and would also assist in the housing crisis facing California and many other parts of the nation.

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[7] Focusing on well defined property rights created by the states allows the Court to take economic rights seriously (as Stephen Macedo has urged in *The New Right v. The Constitution*) while at the same time not succumbing to the danger of creating new rights.

[8] The intangible real property right at issue in this case is hardly the only such state-defined right. In a previous case, this Appeal Court declared unconstitutional a state law granting a property right to automatic project approval if a local agency had not acted upon a completed application within one year (*Selinger v. City of Redlands*, 216 Cal. App. 3d 274 (1989).

(Continued on following page)

CONCLUSION

Planning law throughout the United States contains broad, general policy goals that are implemented by successively more specific ordinances. If a City is allowed to focus on these vague, unfocused policy goals without reference to the more specific ordinances, a city will be able to arbitrarily deny a property owner's subdivision request at will, as Redlands did in this case.

Property rights are defined by state law and in this case Redlands clearly violated Mr. Selinger's state defined right to project approval. The vagueness aspect of this case is intimately related to the property rights aspect: if a City is allowed to deny a project on the basis of vague policy statements, then a property owner's state defined right is worthless.

Many (if not most) violations of property rights will be violations of particular property rights; not all rights associated with the property will be violated and the property will not be rendered totally worthless. Is such a partial taking, then, a violation of the United States Constitution? Partial takings are indeed the more common

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(Continued from previous page)

The Court said adjacent neighbors had their due process rights violated by lack of notice. Assuming arguendo, that the neighbors have a *property right* that can be violated by Mr. Selinger's project, there was the remedy of damages to them that preserved any of their rights and did not abrogate Selinger's state-defined, but constitutionally protected, right. There are of course other such intangible state-defined rights.

taking and conflicting cases of the Supreme Court should be resolved on this point. Hopefully, the Fifth Amendment will be reinvigorated in the process.

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Redlands, CA 92374
(714) 792-0478

APPENDIX A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF
SAN BERNARDINO, CENTRAL DISTRICT

STEPHEN R. SELINGER, an individual, Petitioner and Plaintiff, vs. THE CITY OF REDLANDS, a California general law city, and DOES 1-50, inclusive, Respondents and Defendants.	)	Case No. SCV-244473 STATEMENT OF DECISION

The Court finds that the City of Redlands properly denied Petitioner's Application for Development Project.

Specifically, the Court finds that the City proceeded in the manner required by law; that the decision was supported by the findings; and that the findings were supported by the evidence in that substantial evidence in the administrative record demonstrated that the Project would create significantly adverse and unavoidable impact on traffic in Redlands, especially in the Sunset Drive area.

The Court also finds that there were other adequate bases for denial of the application. The Court declines to rely on those other bases in its decision because the administrative record does not reflect the analytical link

between the evidence and the findings by the City Council as required by the California Supreme Court in *Topanga Association v. County of Los Angeles,* 11 Cal 3d 506 (1974).

DATED: APR 4 1990

/s/ John W. Kennedy, Jr., Judge
JOHN W. KENNEDY, JR.
Judge of the Superior Court

APPENDIX B

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

STEPHEN R. SELINGER,	)	E008115
Plaintiff and Appellant,	)	
	)	(Super.Ct.No.
v.	)	SCV 244473)
CITY OF REDLANDS,	)	
	)	OPINION
Defendant and Respondent.	)	(July 19, 1991)
	)	

APPEAL from a judgment of the Superior Court of San Bernardino. John W. Kennedy, Jr., Judge. Affirmed.

Cox, Castle & Nicholson and Stanley W. Lamport for Petitioner and Appellant.

Best, Best & Krieger, Meredith A. Jury, Daniel J. McHugh and Patrick W. Pearce for Defendant and Respondent.

Stephen R. Selinger (Selinger) appeals from a judgment denying his petition for writ of mandate. In his petition, he sought to compel the City of Redlands (City) to approve a tentative subdivision map for a 304-lot residential development project. On appeal, Selinger contends that (1) the City failed to make required written findings that the project would have an adverse impact

on traffic and on public health and safety; (2) the evidence would not support such findings; (3) there was no substantial evidence to support the finding that the project was inconsistent with the City of Redlands' general plan; and (4) the City failed to preserve Selinger's vested rights.

FACTUAL AND PROCEDURAL BACKGROUND

Background Facts. The background facts are taken from our opinion in Selinger's earlier appeal:

"Selinger is the purchaser of a parcel of approximately 260 acres which was annexed to the City in December 1985. On December 3, 1985, following a public hearing, the City Council zoned the parcel 'R-A,' which called for a minimum lot size of 20,000 square feet.

"In April 1986, Selinger filed an application to develop the parcel as a residential subdivision, designated as tentative tract No. 13294 (the project). The proposed project conformed with existing zoning requirements. On May 12, 1986, the City informed Selinger that his application for the project was complete. On May 19, 1986, the City's environmental review committee determined that an environmental impact report (EIR) should be prepared. Selinger deposited $500 to fund preliminary investigative work for the EIR, and on October 6, 1986, Selinger deposited $17,100 for the cost of preparing the EIR. However, the City Council did not execute a contract with an independent consultant to prepare the EIR until January 12, 1987.

"Meanwhile, on May 20, 1986, the City Council was informed that two major residential subdivision projects were already proposed for the same area (the southeast area) as Selinger's project. The southeast area consists of approximately 2,266 acres of mostly vacant land with a few scattered residences. The southeast area is adjacent to other areas in which significant growth over the next few years has been planned. The City's staff identified potential adverse effects from the development of the southeast area, including lack of a master drainage and sewer collection system, inadequate water pressure, and inadequate streets and highways.

"On June 3, 1986, the City Council adopted ordinance No. 1959 as an urgency measure. Ordinance No. 1959 was an interim zoning ordinance which restricted all developmental approvals in the southeast area for 45 days. Concurrently, the City Council directed its staff to prepare a proposed general plan amendment for the southeast area. The City Council later voted to extend ordinance No. 1959 through June 3, 1987 and again through June 2, 1988.

"By letters dated May 26, 1987, and June 12, 1987, Selinger informed the City Council that the one-year period within which it was required to act on his application had passed, and the application was deemed approved by operation of law. (Gov. Code, §§ 65950, 65956) Following a meeting of the City Council at which Selinger appeared and made a presentation, the City Council denied Selinger's request that his application be deemed approved.

"On December 15, 1987, the City Council adopted a general plan amendment which requires all new development in the southeast area to conform to specified zoning, density and other land use standards. The new zoning reduced the allowable density of the project from 304 residential lots to 120. The same day, the City Council repealed ordinance No. 1959.

"Meanwhile, in September 1987, Selinger filed a petition for writ of mandate. Following a hearing, the trial court ordered a writ of mandate to be issued requiring the City Council to deem Selinger's tentative tract map No. 13294 approved by operation of law and to process the project under the ordinances, policies and standards in effect as of May 12, 1986." (*Selinger v. City Council* (1989) 216 Cal.App.3d 259, 263-265, fns. omitted.)

In the previous appeal, we held that statutes which required automatic approval of development applications were unconstitutional insofar as they failed to provide for adequate notice and a hearing for other landowners affected by the approval. (*Selinger, supra*, 216 Cal.App.3d at p. 274.) We therefore reversed the trial court's issuance of a writ of mandate.

Current Appeal. While the former appeal was pending, the City continued to process Selinger's application for approval of the subdivision map. A draft EIR was completed in June 1987 and certified on February 9, 1988. On March 8, 1988, the City's planning commission held a public hearing on the application and then voted to deny the approval. Selinger timely appealed to the city council.

On April 19, 1988, the city council held a public hearing to consider the appeal and voted to reject

Selinger's application. Three findings were stated at the hearing: (1) that the design and improvement of the project were not consistent with the applicable general and specific plans; (2) that the site was not physically suitable for the proposed density of development; and (3) that the design and improvements of the project were likely to cause serious public health problems. The city council refused to reconsider its decision. Selinger filed a complaint seeking a writ of mandate and damages for deprivation of civil rights and a taking.

In its statement of decision following the hearing on Selinger's petition for writ of mandate, the court found, "[T]he City proceeded in the manner required by law; . . . the decision was supported by the findings; and . . . the findings were supported by the evidence in that substantial evidence in the administrative record demonstrated that the Project would create significantly adverse and unavoidable impact on traffic in Redlands, especially in the Sunset Drive area." The court therefore entered judgment against Selinger on the petition.

DISCUSSION[1]

Standard of Review. The hearing on a subdivision map involves application of general standards to a particular parcel of land, exercise of judgment and discretion, application of subjective considerations, and balancing of competing interests. (*Horn v. County of Ventura* (1979) 24

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[1] All statutory references are to the Government Code unless otherwise indicated.

Cal.3d 605, 614-615.) Accordingly, a decision on an application for tentative map approval " 'is a quasi-judicial act subject to judicial review for abuse of discretion under Code of Civil Procedure section 1094.5.' [Citation.]" (*Id.*, at p. 614.)

On appeal, our function "is to determine whether (1) the findings of the . . . local governmental body . . . are legally sufficient, and (2) whether the findings are supported by substantial evidence and support the agency's decision (*Topanga Assn. for a Scenic Community v. County of Los Angeles, supra,* 11 Cal.3d at p. 510). In making these determinations this court must resolve any reasonable doubts in favor of the agency findings and decision [citations]. Furthermore, in cases of this nature, courts may not substitute their own judgment for that of the agency [citations]." (*McMillan v. American Gen. Fin. Corp.* (1976) 60 Cal.App.3d 175, 182.)

The standard for determining the adequacy of agency findings is whether the findings are "sufficient to enable the parties to determine whether and upon what basis they should seek review and to allow a reviewing court to determine the basis for the agency's action. [Citation.] However, great specificity is not required. It is enough if the findings form an analytic bridge between the evidence and the agency's decision. [Citation.] In addition, findings are to be liberally construed to support rather than defeat the decision under review. [Citation.]" (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1989) 214 Cal.App.3d 1348, 1356.)

If we find that the findings are legally sufficient, we must then determine whether the findings "are supported

by substantial evidence in light of the record as a whole." (*Boreta Enterprises, Inc. v. Department of Alcohol Beverage Control* (1970) 2 Cal.3d 85, 94.) We must "scrutinize the record and determine whether the substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.) Substantial evidence " 'must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.' " (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

Legal Sufficiency of Findings. Selinger challenges the City's decision on the ground that the City failed to make required written findings under section 65589.5, subdivision (j)[2]. Selinger also claims the evidence was insufficient to support such findings.

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[2] "(j) When a proposed housing development project complies with the applicable general plan, zoning, and development policies in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exist:

"(1) The housing project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density.

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The City concedes that it did not make written findings; however, it argues that written findings were not required because it found the project was inconsistent with the general plan. Section 65589.5, which requires written findings, applies only to denials of projects which are *consistent* with local general plans.[3] We therefore determine whether the City's oral finding of inconsistency with the general plan was legally adequate.

In *Carmel Valley View, Ltd. v. Board of Supervisors* (1976) 58 Cal.App.3d 817, the court reviewed a challenge to a local agency's finding that a development site was not physically suitable for the proposed development. The court noted, "The board of supervisors made no written findings, but the planning commission, which had initiated the rejection of the tentative subdivision map, had found that the site was not physically suitable for use of individual sewage disposal systems. The action of the board of supervisors in effect adopted the findings of the planning commission with respect to the physical unsuitability of the site for the planned development. Respondent was fully apprised of the reason for the

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(Continued from previous page)

"(2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density." (§ 65589.5, subd. (j) (1), (2).)

[3] Selinger also argues that in acting to disapprove the project, the City bore the burden of proving under section 65589.6 that its decision conformed to the conditions specified in section 65589.5. However, neither section 65589.5 nor 65589.6 is implicated unless a city first finds consistency with the local general plan.

action of the board of supervisors and no additional written findings were necessary." (*Id.*, at p. 823.)

Here, likewise, the planning commission voted to deny approval, and on appeal, recommended that the city council deny approval of the project. The planning commission's recommendations were presented to the city council in the form of a staff report and in the testimony of the City's planning director. Other citizen witnesses testified in opposition to approving the project. Selinger testified in favor of the project and challenged the recommendations of the planning commission and its proposed findings. In disapproving the project, the city council in effect adopted the written findings included in that staff report [sic] We conclude, as did the court in *Carmel Valley*, that the oral finding of inconsistency with the general plan was legally adequate. We next address Selinger's challenge to the sufficiency of the evidence to support that finding.

Evidence Relating to Finding of Inconsistency With General Plan. The staff report submitted to the city council recommended a finding of inconsistency with the general plan. The report stated, "Although Tentative Tract 13294 is consistant [*sic*] with the Hillside Residential General Plan density range of one to three units per acre, it is inconsistent with two of the three policies of the General Plan related to Hillside Residential. Those policies (p. 12, General Plan) are to: a) Encourage retention of natural hillside areas (earth and vegetation) and minimize the quantity of earth moving as much as possible; and b)

provide adequate streets and vehicular circulation to serve the area."[4]

The staff report summarized grading statistics for other recent development projects in the hillside residential area. The staff report noted, "[T]he grading plan for tentative tract 13294 shows an earth moving requirement of 1,500,000 cu. yards with an average of 4934 cubic yards per lot; almost double the average and 18% more earth moving than required for the most extreme case on record . . . . " The report stated that the subdivision with the most similar topography had been accomplished with "38% less quantity of earth moving per lot and retained almost twice the amount of natural hillside area as proposed by tract 13294." At the hearing, a staff member explained, "Now, those tracts are given to you for kind of a gross comparison to compare what we have approved before under the general plan and compare it to what the

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[4] The applicable General Plan stated, "1. LOW DENSITY HILLSIDE (1-3 UNITS PER NET ACRE)

"The low density residential areas are proposed for the hillsides in the southeast section of the City. The following principles for development of hillsides contain planning policies and standards which can be applied with consistency to all future development of these areas:

"Develop the hills to a maximum overall density of two families per net residential area.

"Encourage the retention of natural hillside areas (earth and vegetation) and minimize the quantity of earth moving as much as possible.

"Provide adequate streets and vehicular circulation to serve the area and also permit good access to all areas for emergency vehicles."

applicants proposed here. They're not strictly comparable because most of them are in topography that is not as steeply insized [*sic*] as the topography that is being proposed to be subdivided here. As you are quite familiar, the land to the south of Sunset Drive is the most extreme topography in Redlands. . . . [¶] For that reason I think the best comparison of this with other tracts that have been approved is probably tract No. 12808, the Yeoman . . . tract, which was recently approved on the southwest corner of Alessandro and Sunset Drive. Now, comparison with that tract shows that it was accomplished with 38 percent less quantity of earth moving per lot and maintained almost twice the natural area – the natural slope areas. [¶] We think that's the best indication of what has been approved previously under our general plan and an indication that this tract is not consistent with what is intended under our existing general plan."

At the city council hearing, Selinger stated, "[T]he E.I.R. said the site was suitable for grading with two-to-one slopes. It said this on pages 54 to 59, basic standard, and we've complied with the uniform building code standards." Selinger also provided a written response to the staff report which noted that he knew of no example of a project ever being denied on the basis of the amount of grading it would require. He also noted that slopes could be replanted with native vegetation as a mitigation measure. In another letter submitted to the city council, Selinger asserted that one of the comparisons in the grading summary was unfair. He stated that the tract used for comparison "was a planned unit development tract with smaller lots and so it would of course have less

grading than a normal subdivision; yet staff persisted in using this as a comparison again and was not intellectually honest enough to point this out. A comparison with the Wimbleton tract (12852) in fact shows that they moved 6458 cubic yard per acre which is *12% more* than the 5769 cubic yards per acre that my tract is proposing to move and yet that tract (like all others) was not turned down because its grading was inconsistent with the general plan."

Selinger raises several challenges to evidence that the project was inconsistent with the grading policy of the general plan. He contends that the figures in the staff report are misleading because (1) the project was five times larger than the largest of the projects used for comparison; and (2) the comparison chart showed earth moved per lot rather than per acre. We do not agree that the chart was misleading. It is apparent from the face of the chart that each of the comparison projects was considerably smaller than Selinger's project. Even though data on earth moved per acre might have been helpful to the city council, there was no requirement that the information be presented that way. A simple arithmetical calculation can produce such data from the information on the chart. Despite Selinger's criticisms, the staff report provides an evidentiary basis for the city council's action.

Selinger also argues that the projects listed on the chart were not truly comparable to his project, because only one of the other projects had topography as extreme as his proposed development. Again, we disagree. The issue facing the city council was to apply the general plan policy of minimizing grading in a consistent way for hillside residential development. Thus, *any* project in the

hillside residential area could provide an appropriate comparison.

Next, Selinger notes that the city council certified the EIR for the project, and the EIR stated, "Tentative Tract 13294, as proposed, is consistent with both the City's General Plan and Zoning for the subject site." To approve a tentative map, the local agency must make an affirmative finding that the map is consistent with the applicable general and specific plans. (§§ 66473.5[5], 66474, subds. (a), (b)[6]; *Woodland Hills Residents Assn., Inc. v. City Council* (1975) 44 Cal.App.3d 825, 837.) A statement of consistency in the EIR is not such a finding; an EIR is an informational document which an agency may use as

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[5] "No local agency shall approve a tentative map, . . . unless the legislative body finds that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan . . . or any specific plan . . . . [¶] A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed subdivision or land use is compatible with the objectives, policies, general land uses and programs specified in such a plan." (§ 66473.5.)

[6] "A legislative body of a city . . . shall deny approval of a tentative map . . . if it makes any of the following findings:

"(a) That the proposed map is not consistent with applicable general and specific plans as specified in Section 65451.

"(b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans. . . . " (§ 66474, subds. (a), (b).)

evidence to guide its land use decisions. (See *Carmel Valley, supra,* 58 Cal.App.3d at p. 822.) The statement of consistency in the EIR did not preclude that city council from reaching a contrary conclusion in ruling on the project application.

Selinger further argues, "A general plan and its elements must be construed as an integrated, internally consistent and compatible statement." (§ 65300.5.) Thus, he contends, "the grading policy must be read in context with the rest of the general plan, which states that the principles of developing the hills to a maximum density of two units per net residential acre, and minimizing grading as much as possible, shall be applied with consistency. In other words grading should be minimized consistent with two units per acre."

However, the subtitle of the section concerning low density residential development specifies "1-3 units per net acre." Thus, the grading policy requires grading to be minimized consistent with one to three units per net acre, up to a *maximum* of two units per net acre. This flexible standard reasonably may be construed as reflecting the fact that the topography within the hillside residential district varies considerably. The policy of minimizing grading may lead to lower density in areas with the most extreme slopes. In fact, the project which Selinger concedes was most comparable to his proposed project had a density of only .59 lots per acre. Our interpretation of the policy is borne out in the City's lot size requirements for the R-A zone. By way of illustration, although the minimum size for a lot with a slope of 0 to 15 percent is 20,000 square feet, the minimum size for a lot with a slope of 16 to 30 percent is 25,000 square feet and the minimum size

for a lot with a slope greater than 30 percent is 40,000 square feet.

Selinger also argues that the project complied with the City's grading ordinance, and therefore should not be found to be inconsistent with the general plan. Even if we accept Selinger's argument that there is an implied requirement that all local ordinances affecting development must be consistent with the general plan (see *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 997-998), it does not necessarily follow that compliance with ordinances relating to building is the equivalent of consistency with the general plan.

We conclude that substantial evidence supported the City's finding that the project was not consistent with the general plan. That finding was a sufficient basis for denying approval for the project. Therefore we need not consider Selinger's additional contentions.

DISPOSITION

The judgment is affirmed. Respondent shall recover costs on appeal.

NOT FOR PUBLICATION

/s/ Dabney
Acting P.J.

We concur:

/s/ Timlin
J.

/s/ McDaniel
J.*

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX C

1. LOW DENSITY HILLSIDE (1-3 UNITS PER NET ACRE)

The low density residential areas are proposed for the hillsides in the southeast section of the City. The following principles for development of hillsides contain planning policies and standards which can be applied with consistency to all future development of these areas:

- Develop the hills to a maximum overall density of two families per net residential acre.
- Encourage the retention of natural hillside areas (earth and vegetation) and minimize the quantity of earth moving as much as possible.
- Provide adequate streets and vehicular circulation to serve the area and also to permit good access to all areas for emergency vehicles.

* * *

APPENDIX D

SECTION 14.00: R-A RESIDENTIAL ESTATE DISTRICT REGULATIONS

The following regulations shall apply in the "R-A" Residential Estate Districts:

Section 14.10: USES PERMITTED

No building, structure or land shall be used, and no building or structure shall be hereafter erected, structurally altered or enlarged, except for the following purposes:

A. Uses permitted in the "A-2" Agricultural District, provided the area of the lot be not less than that required in the "A-2" District.

That stables and corrals for horses be kept not less than 40 feet from dwellings on the property and not less than 40 feet from side property lines and streets, and not less than 100 feet from all other structures used or intended for human occupancy, and not less than 100 feet from a future residential building site, and not less than 100 feet from a public park or schools, and, further

1. Evergreen planting screens, or other protective devices, may be required on property lines when minimum distances are used, and further

2. No grazing shall be permitted in any required yard, and, further

3. Lot area for 1 horse shall not be less than 25,000 square feet, with 15,000 square feet additional lot area for each additional horse, and, further

4. No more than 3 horses may be kept on any lot or parcel, subject to the housing provisions of paragraph (A) above. (1070)

B. Single family residential use, not more than one (1) dwelling unit per lot.

C. Public schools, parks and playgrounds, subject to review and approval by the Commission.

D. Private greenhouses or horticultural collections incidental to the residential use of the premises.

E. Home occupations as defined in this Ordinance and subject to the provisions of Section 34.00.

Churches, subject to a Conditional Use Permit. (1088)

14.20: PROPERTY DEVELOPMENT STANDARDS

A. MINIMUM LOT AREA (Ord. 1773)

Slope	Area
0 to 15%	20,000 sq. ft.
16 to 30%	25,000 sq. ft.
Greater than 30%	40,000 sq. ft.

B. MINIMUM LOT DIMENSIONS

One hundred (100) feet in width. One hundred twenty (120) feet in depth.

C. MAXIMUM POPULATION DENSITY

One (1) dwelling per unit per lot

D. MAXIMUM COVERAGE BY STRUCTURES

Twenty (20) percent of the lot area

E. MAXIMUM BUILDING HEIGHT

Two and one-half (2½) stories or thirty-five (35) feet. See Section 45.10 for exceptions.

Section 14.30: FRONT YARDS

Each lot shall have a front yard extending for the full width of the lot. Said yard shall be not less than twenty-five (25) feet.

See Section 37.00 (b) for partly built up blocks.

See Section 37.00 (d) for key lots.

SECTION 14.40 SIDE YARDS (Ord. 1728)

Each lot shall have a side yard of not less than five (5) feet on one side and not less than ten (10) feet on the opposite side; provided, however, an interior lot shall have not less than a ten (10) foot level side yard on the garage side. A corner lot shall have the garage adjacent to the interior lot line with not less than a ten (10) foot level side yard.

See Section 37.00 (e) for side yards on corner lots.

See Section 37.00 (f) for side yards on reversed corner lots.

See Section 38.00 for regulations applying to computation of yards.

Section 14.50: REAR YARDS

See Section 12.20.

APPENDIX E

ORDINANCE NO. 2030

AN ORDINANCE OF THE CITY OF REDLANDS AMENDING THE REDLANDS MUNICIPAL CODE PERTAINING TO HILLSIDE GRADING AND THE ESTABLISHMENT OF A HILLSIDE DEVELOPMENT OVERLAY DISTRICT

R.P.C. No. 718

THE CITY COUNCIL OF THE CITY OF REDLANDS does ordain:

SECTION ONE: It is deemed advisable and desirable to amend the Redlands Municipal Code to establish a Hillside Development Overlay District to protect public health, safety and general welfare in hillside areas of the City; implement Measure N which requires limited density on slopes over 15 percent and preservation of ridgelines and scenic vistas; and implement the Live Oak Canyon (Southeast Area) General Plan Amendment No. 28; therefore, Chapter 18.138 is hereby added to the Redlands Municipal Code which is the read as follows:

* * *

SLOPE DENSITY REQUIREMENTS

A. Maximum dwelling unit density on portions of land parcels with a cross slope of 15-30% shall not exceed one dwelling unit per two and one-half acres.

B. Maximum dwelling unit density on portions of land parcels with a cross slope exceeding 30 percent shall not exceed one dwelling unit per ten acres unless the following conditions are met:

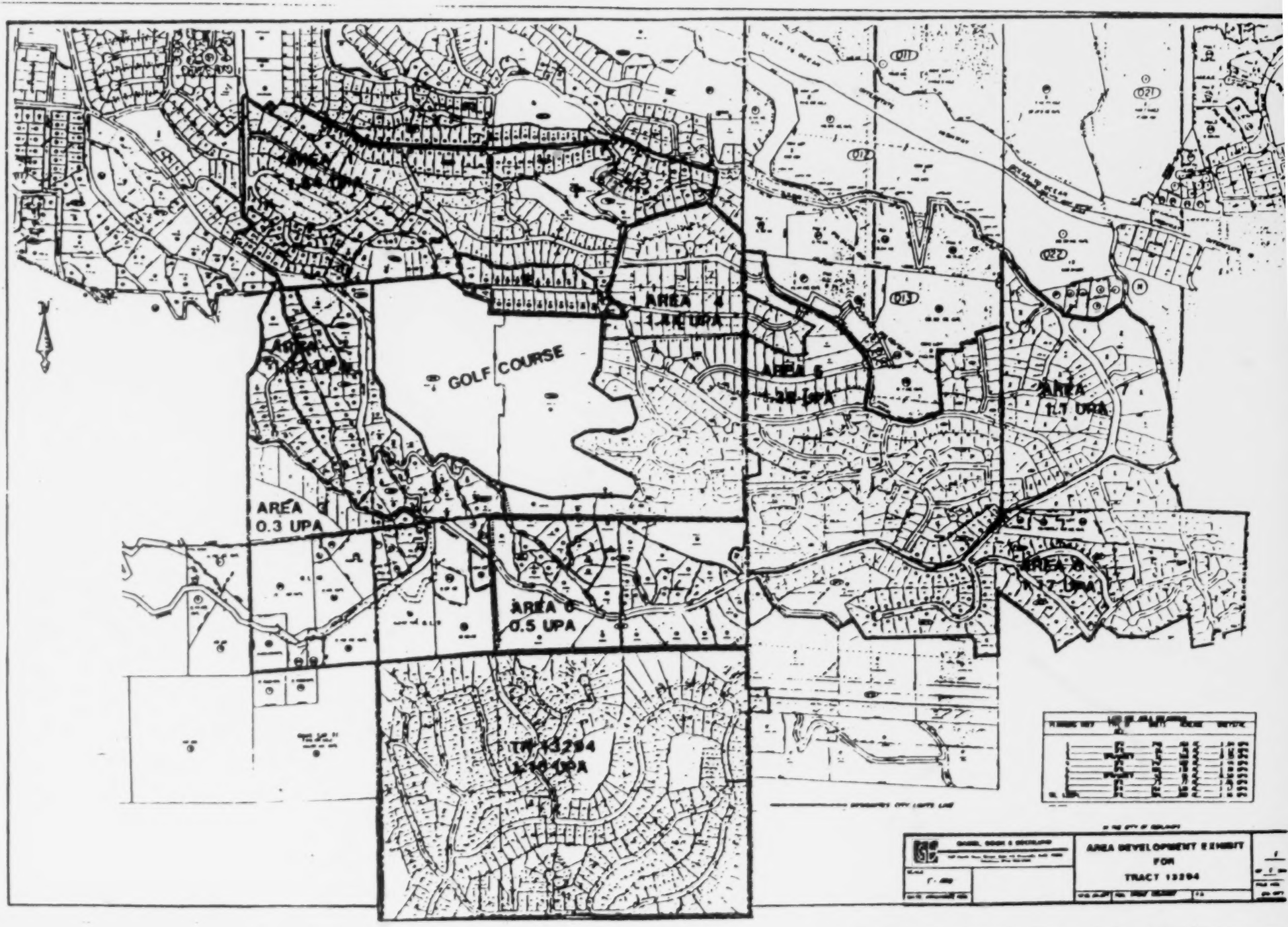
1. The building envelope is not located within the Saugus Sandy Loam soil series as mapped by the Soil Conservation Service, or by site specific studies reviewed by the U.S. Soil Conservation Service.

2. The maximum dwelling unit density does not exceed standards of the following table:

Average Cross Slope (%)	Minimum Area per Dwelling Unit (acres)
Greater than 30	5.0
32	5.5
33	6.0
34	6.5
35	7.0
36	7.5
37	8.0
38	8.5
39	9.0
40 and greater	10.0

* * *

APPENDIX F



AREA DEVELOPMENT

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APPENDIX G

* * *

2. Planned Land Uses

The subject site is currently planned as Hillside Residential permitting 1 to 3 units per acre on the City of Redlands General Plan Land Use Map. The current zoning is R-A (Residential Estate District) which permits a minimum lot area of 20,000 square feet. *Tentative Tract 13294, as proposed, is consistent with both the City's General Plan and Zoning for the subject site.* (p. 73 of E.I.R., emphasis added)

* * *

In summary, Tentative Tract 13294 is found to not be consistent with proposals included in the Southeast Area General Plan Amendment because of the following:

- it proposes significant landform alternative which the GPA proposes to minimize;
- it proposes the elimination of natural vegetation and wildlife habitat which the GPA proposes to preserve;
- it requires sewer service which is inconsistent with the area.

Mitigation Measures

Tentative Tract 13294 should be redesigned consistent with policy recommendations of Southeast Area GPA. (p. 79 of E.I.R.)

APPENDIX H

* * *

Mitigation Measures

It is suggested that further study be undertaken to evaluate the denial of project traffic access to Sunset Drive except for emergency purposes. This would direct all traffic onto Live Oak Canyon Road. Further study should also include what additions should be made to live Oak Canyon Road to accommodate additional traffic generated by this suggestion. (p. 93 of E.I.R.)

* * *

Mitigation Measures

Further soil testing measuring the actual permeability of on-site soils could provide evidence that septic tank usage was appropriate for the project. The testing should evaluate that following items:

a. The height of groundwater beneath the project site to determine whether septic tank usage could contaminate an underground water supply;

b. The cumulative impact of 304 septic tanks on a 290 acre parcel over an extended period of time; and

c. The likelihood of municipal sewers being extended to the project within the lifespan of the septic tanks and methods of insuring connection of lots on septic tanks to the municipal sewer. (p. 111 of E.I.R.)

* * *

VI. UNAVOIDABLE SIGNIFICANT ADVERSE IMPACTS

Unavoidable significant adverse impacts are impacts that are found in the environmental review that cannot be fully mitigated. These impacts must either be reduced to a non-significant level by adoption of the one or more of the following alternatives or upon adoption, the City Council must make a statement of overriding considerations. The statement is finding by the City Council that the environmental consequences posed by the unavoidable significant adverse impact are outweighed by some other identified benefit to the community proposed by the project.

A. TRAFFIC: Unsafe conditions along Sunset Drive will be increased by more traffic from project. Only feasible mitigation is to divert all traffic to Live Oak Canyon Road.

B. WASTEWATER DISPOSAL: It cannot be determined based upon existing available information that the subject site is suitable for the usage of septic tanks. Also, City policy is to utilize community sewer systems.

C. CUMULATIVE IMPACTS: The the [sic] cumulative impact of the proposed project and two adjacent projects may pose a significant adverse impact in the areas of traffic and wastewater disposal. (p. 127 of E.I.R.)

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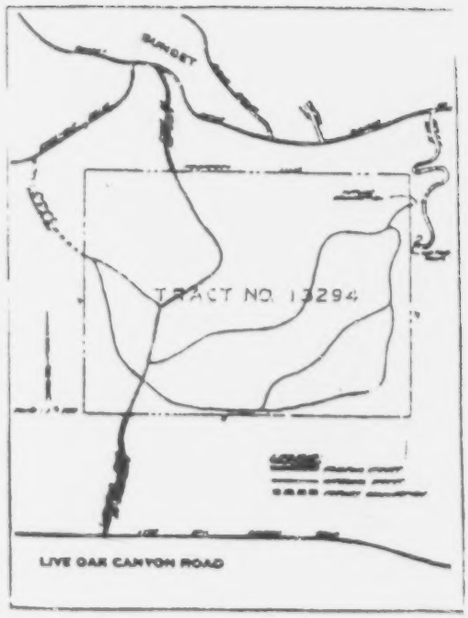
Tract 13294 on
Redlands General Plan
Circulation Map



Tract 13294 Circulation Map

Supreme Court, U.S.
FILED
JAN 30 1992
OFFICE OF THE CLERK

No. 91-1079

In The

Supreme Court of the United States

October Term, 1991

STEPHEN R. SELINGER,

Petitioner,

v.

CITY OF REDLANDS,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal, Fourth District, Division Two, State Of California

BRIEF OF RESPONDENT CITY OF REDLANDS IN OPPOSITION

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QUESTIONS PRESENTED

Respondent City of Redlands respectfully submits that petitioner Stephen R. Selinger's designation of the questions presented for review is incorrect. This is not an appeal which involves any issues of federal law whatsoever. The questions presented for review were previously correctly listed by the Court of Appeal (Fourth District, Division Two) for the State of California, as follows:

1. Did the City of Redlands fail to make the written findings required by California Government Code section 65589.5(j) that petitioner's project would have an adverse impact on traffic and on public health and safety?

2. Was the City of Redlands' decision to deny petitioner's project based on its finding that the project did not comply with the City of Redlands' General Plan supported by substantial evidence in the administrative record?

3. Was the City of Redlands' decision to deny petitioner's project based on the findings of an adverse impact on traffic and on public health and safety supported by substantial evidence in the administrative record?

4. In denying petitioner's project, did the City of Redlands violate petitioner's vested property rights under state law?

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STATUTES AND COURT RULES INVOLVED

Supreme Court Rule 10 states:

Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

Supreme Court Rule 14 states:

Rule 14. Content of the Petition for a Writ of Certiorari

.1. The petition for a writ of certiorari shall contain, in the order here indicated:

(a) The questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail. The questions should be short and concise and should not be argumentative or repetitious. They must be set forth on the first page following the cover with no other information appearing on that page. The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, unless the names of all parties appear in the caption of the case. This listing may be done in a footnote. See also Rule 29.1 for the required listing of parent companies and nonwholly owned subsidiaries.

(c) A table of contents and a table of authorities, if the petition exceeds five pages.

(d) A reference to the official and unofficial reports of opinions delivered in the case by other courts or administrative agencies.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the entry of the judgment or decree sought to be reviewed;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to file the petition for a writ of certiorari;

(iii) Express reliance upon Rule 12.3 when a cross-petition for a writ of certiorari is filed under that Rule and the date of receipt of the petition for a writ of certiorari in connection with which the cross-petition is filed; and

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix referred to in subparagraph .1(k) of this Rule.

(g) A concise statement of the case containing the facts material to the consideration of the questions presented.

(h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in

the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.

(i) If review of a judgment of a United States court of appeals is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 10.

(k) An appendix containing, in the following order:

(i) The opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Any other opinions, orders, findings of fact, and conclusions of law rendered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry.

(iii) Any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry.

(iv) The judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph.

(v) Any other appended materials.

If what is required by subparagraphs .1(f), (h), and (k) of this Rule to be included in or filed with the petition is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

.2. The petition for a writ of certiorari and the appendix thereto, whether in the same or a separate volume, shall be produced in conformity with Rule 33. The Clerk shall not accept any petition for a writ of certiorari that does not comply with this Rule and with Rule 33, except that a party proceeding in forma pauperis may proceed in the manner provided in Rule 39.

.3. All contentions in support of a petition for a writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph .1(j) of this Rule. No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

.4. The petition for a writ of certiorari shall be as short as possible and may not exceed the page limitations set out in Rule 33.

.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

California Public Resources Code section 21167 provides:

Commencement of Actions or Proceedings; Time

Any action or proceeding to attack, review, set aside, void, or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division shall be commenced as follows:

(a) An action or proceeding alleging that a public agency is carrying out or has approved a project which may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the

public agency, within 180 days after commencement of the project.

(b) Any action or proceeding alleging that a public agency has improperly determined whether a project may have a significant effect on the environment shall be commenced within 30 days after the filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152.

(c) Any action or proceeding alleging that an environmental impact report does not comply with the provisions of this division shall be commenced within 30 days after the filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152 by the lead agency.

(d) Any action or proceeding alleging that a public agency has improperly determined that a project is not subject to the provisions of this division pursuant to subdivision (b) of Section 21080 or pursuant to Section 21085 or 21172 shall be commenced within 35 days after the filing by the public agency, or person specified in subdivision (b) or (c) of Section 21065, of the notice authorized by subdivision (b) of Section 21108 or subdivision (b) of Section 21152. If such notice has not been filed, such action or proceedings shall be commenced within 180 days of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days after commencement of the project.

(e) Any action or proceeding alleging that any other act or omission of a public agency does not comply with the provisions of this

division shall be commenced within 30 days after the filing of the notice required by subdivision (a) of Section 21108 or subdivision (a) of Section 21152.

1. INTRODUCTION

If this case is, as petitioner Stephen R. Selinger ("Selinger") urges, a "typical California land use 'horror' story" (PW, p.1), it is the direct result of Selinger's stubborn refusal to make the necessary alterations to the configuration of his project to bring it in conformance with the City of Redlands' ("City") General Plan.[1]

Instead, Selinger has waged a bitter (and unnecessary) war with the City over *every* aspect of his project – a war which has lasted for over four years and taken the parties to three different levels of the judiciary in two separate writ of mandate proceedings.[2] Despite the fact that Selinger has radically altered the focus of his case even to the extent of raising new issues, the underlying purpose of the petition is the same, i.e., to obtain from this Court what the City and the judiciary have thus far refused – approval to build an unsafe subdivision.

---

[1] All references in this brief to "PW" refer to Selinger's Petition For Writ of Certiorari filed with this Court.

[2] Selinger's first writ – regarding a different issue relating to the *same* project – resulted in the *Selinger v. City of Redlands*, 216 Cal.App.3d 259 (1989) (*"Selinger"*) decision.

2. STATEMENT OF FACTS

Although the *basic* facts of this case are largely undisputed and were previously established in another case before the state appellate court involving the same parties and subject matter, Selinger uses a considerable portion of his petition to disparage the City and its elected City Council through a series of unfounded and unsupported assertions.

In an effort to depict the City Council as an unscrupulous body of individuals, Selinger accuses the City Council of "inventing a perverted interpretation of its old ordinances" to "circumvent state law." (PW, p. 4.)[3]

These unfounded accusations aside, Selinger's brief also contains numerous mischaracterizations of the facts of this case. Rather than correct each and every one, we urge this Court to review the facts as recited by the state Court of Appeal in its opinion (PW, attached as Appendix 3).[4] These are the undisputed facts and were largely taken from the appellate court's previous decision in *Selinger*. Accordingly, the facts shall not be repeated here.

Procedural Overview

Selinger initially commenced this action in the San Bernardino Superior court by filing a petition for writ of

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[3] The City has had to endure similar attacks from Selinger in other courts. This continuing barrage of insults has, however, become progressively worse.

[4] "Opinion" refers to the Court of Appeal's written decision, a copy of which is attached to Selinger's petition starting at Appendix 3.

mandate compelling the City to approve a 304-lot residential subdivision (the "Project") located in a scenic area of the southeast portion of the City.

The Redlands City Council had previously denied the Project after considering, among other things, the results of the Environmental Impact Report ("EIR") for the Project, which identified unavoidable significant adverse impacts in the categories of traffic, wastewater disposal and cumulative impacts, and after holding a public hearing at which it reviewed testimony that unequivocally established that the Project would violate two of the three policies of the City's General Plan.[5]

Both at trial and in his original petition, Selinger argued that these findings were not based upon substantial evidence in the administrative record and, consequently, the City's decision to deny the Project was improper and unlawful.

The trial court disagreed with Selinger's contentions and found that the City's decision to deny the Project was supported by substantial evidence.

On appeal, the trial court's judgment was affirmed. At the heart of the Court of Appeal's decision was the conclusion that "substantial evidence supported the

---

[5] Not surprisingly, the City denied the Project based upon its findings that: (1) the design and improvement of the subdivision were not consistent with the applicable General and Specific Plans of the City; (2) the site for the Project was unsuitable for the proposed density of the development; and (3) the design of the subdivision and the type of improvements necessitated by the Project were likely to cause a serious public health problem.

City's finding that the project was not consistent with the General Plan." (Opinion, PW – Appendix 16.) As a result, the Court of Appeal found it unnecessary to go further: "That finding was a sufficient basis for denying approval for the project. Therefore we need not consider Selinger's additional contentions." (Opinion, PW – Appendix 16.)[6]

Selinger next petitioned the California Supreme Court for review, without success. This petition followed.

3. PROCEDURAL REASONS TO DENY THE WRIT

Selinger's petition now seeks review of issues of public law, policy and planning which were never raised in the lower courts. In its opinion, the Court of Appeal (Fourth District, Division Two) correctly listed the issues presented for its consideration as whether "(1) the City failed to make required written findings that the project would have an adverse impact on traffic and on public health and safety; (2) the evidence would not support such findings; (3) there was no substantial evidence to support the finding that the project was inconsistent with the City of Redlands' General Plan; and (4) the City failed to preserve Selinger's vested rights." (Opinion, PW – Appendix 3 and 4.)

---

[6] Both the trial court and the Court of Appeal found substantial evidence to support the City's decision and, for that reason, never needed to consider Selinger's contentions that he had a vested right to proceed with the project. To the extent that Selinger now uses this latter contention as a basis for review, the issue is not ripe.

Just as he attempted to do in his rejected petition for review to the California Supreme Court, Selinger now includes in his list of questions presented to this Court the general inquiry as to whether "due process prohibitions against vague economic ordinances prevent a municipality from disapproving a project on the basis of unfocused (general plan) policy statements." (PW, p. i.) Selinger tried to place this very same issue before the state Court of Appeal by lobbying the Building Industry Legal Defense Foundation ("BILDF") and the Building Industry Association of Southern California ("BIA") for support. Subsequently, attorneys for the BILDF and the BIA (a law firm which later undertook Selinger's representation at the state Supreme Court level) requested permission of the Court of Appeal to file an Amicus Curiae brief which focused on that subject matter. The Court of Appeal rightly denied the application.

Selinger's persistent efforts to inject broader issues of policy into this case – a case of insufficient legal or public interest to warrant either publication by the Court of Appeal or review by the California Supreme Court – flies in the face of the well-established rule that issues which could have been but were not timely raised in the lower courts are *not* subject to review.

Thus, Selinger's petition for review in this Court fails to comply with Supreme Court Rule 14, which states:

> *"If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised;* the method or manner of raising them and the way

> in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari." (Emphasis added.)

To the extent that Selinger now proposes review of issues relating to public policy, planning and due process, his brief contains no specific references to "the stage in the proceedings, both in the court of first instance and in the appellate courts," at which such federal questions were raised, as required by Rule 14. Selinger's inability to comply with this rule is, of course, a function of the fact that these issues were never raised below.

The other question which Selinger presents for this Court's consideration – whether a "partial taking" of a well-defined property right is a violation of the United States Constitution – is now for the first time being characterized as an issue of federal rather than state law. When presented to the Court of Appeal, this issue was expressed only in terms of whether "the City failed to preserve Selinger's vested rights." (Opinion, PW – Appendix 3 and 4.) No mention was made at either the trial or appellate court levels of whether the City's alleged actions violated the United States Constitution or indeed any federal law.

By raising now a new issue and recharacterizing another, Selinger's petition at first glance appears to fit

within those items listed in Supreme Court Rule 10 as considerations for review by this Court. On closer inspection, however, Selinger's petition does not pass muster. Thus, Selinger's lengthy discussion of two past decisions of this Court – *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) and *Webb's Fabulous Pharmacies v. Arthur H. Beckwith, Jr., Clerk of the Circuit Court*, 449 U.S. 155 (1980) – is notable only because Selinger has never before cited, discussed or even mentioned these cases in any lower court.

The reason for Selinger's untimely and contrived fascination for the *Penn Central* and *Webb* decisions is clear. Through a distorted interpretation of these decisions, Selinger is able to create an artificial conflict between them. This, Selinger says, is a basis for review. (PW, pp. 10 and 11.) We respectfully submit that if this Court felt that it was either likely or possible that two of its own decisions could be in such conflict, this possibility would have been specifically enunciated in Supreme Court Rule 10 as one possible ground for review.

For these reasons and those explained more particularly below, the City respectfully requests that the petition be denied.

4. SUBSTANTIVE REASONS TO DENY THE WRIT

A. SELINGER'S ARGUMENT THAT THE CITY DISAPPROVED THE PROJECT DESPITE A PREVIOUS DETERMINATION THAT THE PROJECT WAS CONSISTENT WITH THE GENERAL PLAN IS MISLEADING

A recurrent theme in Selinger's sustained effort to overturn the trial court's judgment centers upon his claim

that "after just certifying an environmental impact report stating that the project was consistent with the zoning and general plan, and after having studied the project for 20 months, the City asserted for the first time that the project was inconsistent with the general plan." (PW, p. 7.)

In his petition, Selinger cavalierly brushes over the fact that the Environmental Impact Report ("EIR") itself identified unavoidable significant adverse impacts in the categories of traffic, wastewater disposal and cumulative impacts. Selinger's sole response at the Court of Appeal to the conclusions reached in the EIR was to attack the validity of the EIR's findings, despite the fact that Selinger had previously failed to challenge the sufficiency of the EIR within the statutory time period set forth in California Public Resources Code section 21167. Selinger apparently wants to have his cake and eat it too. Thus, he claims that the City should be bound by the EIR's conclusion that the Project complies with the City's General Plan, but should not be required to follow its findings that there existed unavoidable significant adverse impacts.[7]

But Selinger's theme rings hollow for another reason, which was quickly spotted by the Court of Appeal and was explained in its Opinion in the following manner:

> "Next, Selinger notes that the City Council certified the EIR for the Project, and the EIR stated,

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[7] The EIR, standing alone, can form the substantial evidence required to justify an administrative agency's decision. (*City of Walnut Creek v. County of Contra Costa*, 101 Cal.App.3d 1012, 1018-1019 (1980).)

> 'Tentative Tract 13294, as proposed, is consistent with both the City's General Plan and zoning for the subject site.' To approve a Tentative Map, the local agency must make an affirmative finding that the map is consistent with the applicable General and Specific Plans. [Citation.] *A statement of consistency in the EIR is not such a finding; an EIR is an informational document which an agency may use as evidence to guide its land use decisions.* [Citation.] *The statement of consistency in the EIR did not preclude that City Council from reaching a contrary conclusion in ruling on the Project application.*" (Opinion, PW – Appendix 15.) (Emphasis added.)

The Court of Appeal's rejection of Selinger's argument in this regard is both logical and supported by case law. (See *Carmel Valley View, Ltd. v. Board of Supervisors*, 58 Cal.App.3d 817, 822 (1976).)

B. THE COURT OF APPEAL CORRECTLY CONCLUDED THAT THE CITY'S DETERMINATION THAT THE PROJECT DID NOT COMPLY WITH THE GENERAL PLAN WAS BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD

Below, the Court of Appeal, quoting from *Topanga Assoc. for a Scenic Community v. County of Los Angeles*, 214 Cal.App.3d 1348 (1989), noted that the standard for determining the adequacy of the findings of a public agency was whether those findings are:

> "[S]ufficient to enable the parties to determine whether and upon what basis they should seek

> review and to allow a reviewing court to determine the basis for the agency's action. [Citation.] However, great specificity is not required. It is enough if the findings form an analytical bridge between the evidence and the agency's decision. [Citation.] In addition, findings are to be liberally construed to support rather than defeat the decision under review. [Citation.]" (Opinion, PW – Appendix 8.)

Selinger's contention that the City's decision to deny the Project was *not* based upon the existence of substantial evidence in the administrative record is misplaced. In fact, the record indicates that in considering Selinger's Project, the City considered a number of sources of relevant and credible information which constitute substantial evidence, including the following:

- Planning Staff Report to the City.[8]
- EIR for the Project and the technical reports used in its preparation.
- Ludwig Traffic Study.
- Testimony of various concerned citizens who appeared at the City's hearing to voice their opposition to the Project.
- Testimony of the City's Planning Staff.

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[8] The Planning Staff Report incorporates summaries of other documents examined by the City and also contains a useful analysis of the City's reasons for denial of the application. Regarding this document, the Court of Appeal noted: "Despite Selinger's criticisms, the Staff Report provides an evidentiary basis for the City Council's action." (Opinion, PW – Appendix 14.)

- The City's General Plan in effect at the time Selinger's Project application was deemed to be complete.

Mindful of the existence of these documents in the record, the Court of Appeal concluded:

> "Here, likewise, the Planning Commission voted to deny approval, and on appeal, recommended that the City Council deny approval of the Project. The Planning Commission's recommendations were presented to the City Council in the form of a staff report and in the testimony of the City's Planning Director. Other citizen witnesses testified in opposition to approving the Project. Selinger testified in favor of the Project and challenged the recommendations of the Planning Commission and its proposed findings. In disapproving the Project, the City Council in effect adopted the written findings included in that Staff Report. We conclude, as did the court in *Carmel Valley*, that the oral finding of inconsistency with the General Plan was legally adequate." (Opinion, PW – Appendix 11.)

In light of the written report prepared by the planning staff, the testimony of the planning staff, and the testimony of others who testified at the hearing, including Selinger, the City's findings made at its April 19, 1988 meeting were supported by substantial evidence in light of the record as a whole and the Court of Appeal's affirmation of this fact should not be overturned.

5. CONCLUSION

Based on the foregoing, Respondent City of Redlands respectfully requests that Selinger's Petition for Review be denied based on the absence of any special or important reasons under Supreme Court Rule 10 to grant review.

Respectfully Submitted,

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In The

Supreme Court of the United States

October Term, 1991

STEPHEN R. SELINGER,

Petitioner,

v.

CITY OF REDLANDS,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal, Fourth District, Division Two, State Of California

REPLY BRIEF TO BRIEF IN OPPOSITION

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REPLY BRIEF

I. Procedural Issues

The City misrepresents the facts to the Court when it claims that the issue of "due process prohibitions against vague economic ordinances" (Response p. 12) was never raised at the Court of Appeal. The case of *Chalmers v. City of Los Angeles*, 762 F. 2d 753 (1985) was cited to the Appeal Court in oral argument and extensively discussed. This case deals almost exclusively with constitutional prohibitions against vague economic regulations. A copy of the transcript can be produced to document this.

With respect to the property rights issue, the City claims that this issue was only expressed in terms of state law and that no mention was made of whether the City's actions violated the United States Constitution (Response p. 13). However, Appellant's Opening Brief (p. 37) specifically cites *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) for the proposition that property rights are created by state law but protected by the United States Constitution. This is the case and principle cited repeatedly in the Petition.

II. Conclusion

The City gives no substantive reasons[1] why the Petition should not be granted – other than repeating the Appeal Court's unargued and unsupportable assertion that a city is not precluded from arbitrarily reversing its

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[1] The City also raises no objections to any specific facts of the case.

general plan consistency determinations (Response p. 16).[2] Petitioner hopes these additional facts show that its procedural objections are equally groundless.

Respectfully submitted,

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[2] The City also misrepresents the Petition in claiming (Response p. 15) that it "cavalierly brushes over the fact that the Environmental Impact Report ("EIR") itself identified unavoidable significant adverse impacts in the categories of traffic, wastewater disposal, and cumulative impacts." In fact, Petitioner specifically referenced this section but, more importantly, pointed out that the very next sentence, and specific sections of the EIR, contain the mitigation measures which avoid these "unavoidable" impacts (Petition pp. 6, 7). These statements of the specific mitigation measures totally contradict the preordained, conclusory remark of "unavoidable" impacts.